BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACLYN R. NAVE Claimant	)	
VS.	)	
FIBERGLASS ENGINEERING, INC. Respondent	)	Docket No. 1,027,018
AND	)	
WAUSAU BUSINESS INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the May 21, 2007, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Elaine F. Winter, of Wichita, Kansas, appeared for claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered that Dr. J. Mark Melhorn was authorized as claimant's treating physician for all treatment, tests and referrals, including surgery.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 16, 2007, preliminary hearing and exhibits and the transcript of the May 3, 2006, preliminary hearing and exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the claimant did not suffer an accidental injury arising out of and in the course of her employment with respondent. But if the Board finds that she did, respondent asserts that claimant is still not entitled to benefits because her current need for treatment is not related to her alleged work-related injury. In addition, respondent contends that claimant suffered an increase in her symptoms from her subsequent non-work-related activities that constitute intervening accidents .

Claimant states that respondent only set out one issue in its Request for Board Review, that being whether claimant's injury arose out of and in the course of her

employment with respondent. Claimant contends that, however, upon submission of respondent's brief, the more obvious issue raised is claimant's request for medical treatment. Claimant argues that the Board does not have jurisdiction to conduct a review of a preliminary award unless it is alleged that the ALJ exceeded his jurisdiction in granting the relief requested at the preliminary hearing. Claimant further contends that regardless of the precise diagnosis, there appears to be no question that she suffered an on-the-job injury.

The issue for the Board's review is:

(1) Did claimant suffer personal injury from an accident arising out of and in the course of her employment at respondent?

(2) If so, is claimant's current need for treatment a direct result of that work-related accident or is it the result of an intervening injury?

(3) Does the Board have jurisdiction of this appeal?

FINDINGS OF FACT

Claimant was employed by respondent, a company that manufactures boats. Her job duties included buffing, sanding and painting boats. She began having problems with her hands and wrists and reported the problem to her supervisor, who gave her a brace to wear. However, in August 2005, while buffing, she dropped her buffer and was unable to pick it up because her hands were swollen and painful. She was sent to Dr. F. Allen Moorhead, Jr. She first saw Dr. Moorhead on August 18, 2005. Nerve conduction tests performed that day were suggestive of carpal tunnel syndrome. Dr. Moorhead took claimant off work on September 30, 2005. In October 2005, Dr. Moorhead referred claimant to Dr. Harry Morris. By January 11, 2006, claimant had been off work three months, and Dr. Morris could not find any condition in her hands that required surgical intervention or further medical treatment. He released her from treatment and gave her no work restrictions. After claimant's release from treatment, she returned to work for respondent. She worked about a month before she was terminated for absenteeism.

On February 13, 2006, claimant was seen by Dr. Pedro Murati, at the request of her attorney. After an examination, Dr. Murati diagnosed her with bilateral carpal tunnel syndrome which he said was "within all reasonable medical probability a direct result from the work-related injury that occurred on 08-17-05 during her employment with [respondent]."[1]

[1] P.H. Trans. (May 16, 2007), Cl. Ex. 2 at 2-3.

On May 3, 2006, a preliminary hearing was held where claimant asked for payment for Dr. Murati's evaluation, a surgical evaluation, and temporary total disability compensation from February 14, 2006, forward. Respondent argued that treatment had been concluded and that the objective medical evidence showed that no further treatment was necessary, and also that claimant had been released to return to work on January 11, 2006, and was later terminated. The ALJ, in his order dated May 22, 2006, denied claimant's request for temporary total disability compensation. He also ordered an independent medical examination (IME) of claimant to be performed by Dr. J. Mark Melhorn, to evaluate and determine treatment recommendations. The ALJ authorized Dr. Melhorn to treat claimant if he felt it was appropriate.

Claimant was seen by Dr. Melhorn for the IME on July 25, 2006. After examination, Dr. Melhorn diagnosed claimant with right and left carpal tunnel syndrome by history, pain and neuropraxia. Dr. Melhorn continued to treat claimant and in his note of August 8, 2006, Dr. Melhorn stated:

> With regard to causation it would appear that her work activities probably did represent a temporary aggravation or increasing symptoms with regard to the upper extremities. Although once the work activities are removed those symptoms should decrease or abate indicating that it was temporary or [*sic*] of a permanent nature. Her current continued subjective complaints may be more related to the pregnancy and therefore will be difficult to sort out until the end of her pregnancy.[2]

Claimant saw Dr. Melhorn on January 18, 2007, after the birth of her baby, complaining of continued symptomatology. She complained of problems feeding her baby, as holding the bottle increased her symptoms. Dr. Melhorn ordered a repeat of the nerve conduction tests and instructed claimant to return in 7 to 10 days for a re-check. There are no subsequent office notes in evidence except for records that show Dr. Melhorn scheduled claimant for median and ulnar nerve decompression surgeries on both the right and left.

Before those surgeries were performed, claimant was seen on March 20, 2007, by Dr. Anne Rosenthal at the request of respondent. Claimant complained of numbness and tingling in all ten digits with unbearable pain in her wrists bilaterally. She told Dr. Rosenthal that she cannot take care of her daughter and can hardly hold a bottle because it hurts so bad. After examining claimant, Dr. Rosenthal stated that currently, no nerve tests performed on claimant were positive, and no provocative maneuvers were consistent with either carpal tunnel syndrome or cubital tunnel syndrome. Dr. Rosenthal suggested claimant may have thoracic outlet syndrome that was not work related. Dr. Rosenthal also observed that claimant showed a significant amount of symptom magnification during the examination.

---

[2] P.H. Trans. (May 16, 2007), Cl. Ex. 1 at 48.

At the preliminary hearing, claimant said she currently suffers from numbness, tingling and pain in her hands and wrists. She has no grip and can barely lift her five-month-old child. Despite being off work, she does not notice any decrease in her symptoms.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[6], the Kansas Supreme Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

---

[3] K.S.A. 2005 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[7], the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

K.S.A. 2006 Supp. 44-501(a) provides that claimant has the burden of proof:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Rash*,[8] the Kansas Court of Appeals stated: "In a workers compensation case, the burden of proof is on the claimant to establish the right to an award. [Citation omitted.] Once the claimant has met this burden, the respondent employer has the burden to demonstrate any exception."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[9]

Preliminary hearings are designed to provide an expedited procedure for an ALJ to make determinations "on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation."[10] Concerning appeals from preliminary hearings, K.S.A. 44-534a(a)(2) states in part:

---

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 186, 154 P.3d 15 (2006).

[9] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002). See also *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[10] K.S.A. 44-534a(a)(1).

> A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[12]

ANALYSIS

Preliminary hearings are designed to provide injured workers an expedited mechanism to obtain medical treatment and temporary total disability benefits in contested cases. Whether claimant's current need for the preliminary hearing benefits of medical treatment and/or temporary total disability is directly attributable to her work-related injuries gives rise to the issue of whether claimant suffered personal injury by accident arising out of and in the course of her employment with respondent. Whether claimant's current symptoms and conditions are the result of personal injuries from the alleged series of accidents arising out of and in the course of her employment with respondent is an issue which K.S.A. 44-534a(a)(2) grants the Board jurisdiction to review on an appeal from a preliminary hearing order.

On the issue of causation, the ALJ gave greater weight to Dr. Melhorn, the court-ordered independent medical examiner, than to Dr. Rosenthal, a physician chosen by respondent:

> Claimant requests treatment per the court ordered Independent Medical Examination performed by Dr. Melhorn. Respondent's expert, Dr. Rosenthal is of the opinion that the symptoms are too remote in time, and not confirmed in testing. The Court places greater weight on its independent expert.[13]

Dr. Melhorn, however, has equivocated on the question of whether claimant's current condition is work related. In August 2006, Dr. Melhorn opined that claimant's work with respondent caused only a temporary aggravation. Nevertheless, in February 2007 he was prepared to perform surgery and indicated there was still a work-related component

---

[11] K.S.A. 44-534a.

[12] K.S.A. 2006 Supp. 44-555c(k).

[13] ALJ Order (May 21, 2007).

to claimant's carpal tunnel syndrome. This was probably due, at least in part, to the fact that claimant's symptoms persisted even after the birth of her baby.

Although Drs. Rosenthal and Melhorn are not in complete agreement, both suggest that if claimant's conditions were caused by her employment, then she should have had some improvement in her symptoms after she stopped working. She has not. To the contrary, her symptoms have worsened and now extend to the elbows. Therefore, her present conditions may not be solely attributable to her work. Nevertheless, claimant was diagnosed with carpal tunnel syndrome and was taken off work by Dr. Moorhead in September 2005, and her hand and wrist symptoms are essentially the same now as they were when she stopped working for respondent. She is no longer pregnant, and so that condition has been eliminated as a cause of her condition. Furthermore, respondent has failed to prove any intervening accident, injury or activity that is a more likely cause of claimant's current condition. As such, preliminary benefits are appropriate.[14]

CONCLUSION

Claimant suffered personal injury to her hands and wrists by a series of accidents arising out of and in the course of her employment with respondent, specifically bilateral carpal tunnel syndrome. Based on the record compiled to date, claimant has met her burden of proof that her current condition and need for medical treatment is directly attributable to her employment with respondent. As such, claimant is entitled to the preliminary benefits ordered by the ALJ.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 21, 2007, is affirmed.

IT IS SO ORDERED.

---

[14] The issue concerning medical treatment raised in this appeal may be moot, as claimant's brief states that "surgical intervention was performed respectively on May 29, 2007 and June 26, 2007." Claimant's Brief at 2 (filed July 2, 2007). If claimant has now had bilateral carpal tunnel syndrome surgery, it will be interesting to see if her symptoms have been relieved. Hopefully, they have been. But if they have not been, that could be further evidence that her symptoms were not due to carpal tunnel syndrome. It may be that claimant also underwent ulnar nerve decompression surgery, as this procedure was originally scheduled to be performed by Dr. Melhorn in February and March 2007 along with the median nerve decompression for the carpal tunnel syndrome.

Dated this _____ day of August, 2007.

_____
BOARD MEMBER

c: Elaine F. Winter, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge